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SOUTHERN COMPANY

Energy to Serve Your World℠

February 28, 2006

Mr. Walter D. Cruickshank
Deputy Director
Minerals Management Service
1849 C Street, N. W.
Washington, D. C., 20240

RE: Request for Comments in ANPR on Alternative Energy Uses on the Outer Continental Shelf

Dear Mr. Cruickshank:

We are enclosing a copy of our comments on your posting of the Advanced Notice of Proposed Rulemaking (ANPR) regarding alternative energy uses on the outer continental shelf, published in the December 30, 2005 *Federal Register*. We appreciate the opportunity to submit these comments and look forward to a timely proposed rulemaking on this subject. In the meantime, if you have any questions or comments, please feel free to contact me.

Sincerely yours,

Chris M. Hobson
Senior Vice President
Research and Environmental Affairs

COMMENTS OF SOUTHERN COMPANY

MINERALS MANAGEMENT SERVICE
ADVANCED NOTICE OF PROPOSED RULEMAKING
ON ALTERNATE ENERGY-RELATED USES
ON THE OUTER CONTINENTAL SHELF
Docket No. RIN 1010-AD30

I. INTRODUCTION

These comments provide the Minerals Management Service ("MMS") with recommendations regarding the promulgation of regulations for Section 388 of the Energy Policy Act of 2005 ("EPACT" or "the Act"). They respond to MMS's Advance Notice of Proposed Rulemaking ("ANPR") published in the *Federal Register* on December 30, 2005.[1]

Instead of responding to each of the 36 questions posed in the ANPR individually, we focus our comments on the issues of highest priority for Southern Company, generally coincident with the five ANPR Program Areas, and comment broadly on offshore wind energy development and Section 388's purpose. Otherwise, we indicate which of MMS's 36 specific ANPR questions are being addressed. We hope that organizing our comments in this fashion will give MMS an appreciation of our perspective and concerns as a potential private sector offshore wind project developer.

Southern Company (NYSE: SO) is a super-regional energy company with more than 40,000 megawatts ("MW") of electric generating capacity in the Southeast. Southern Company is one of the largest producers of electricity in the United States, supplying energy to a 120,000-square-mile service territory spanning most of Georgia and Alabama, southeastern Mississippi, and the panhandle region of Florida. Southern Company is ranked number 180 on the latest Fortune 500 listing of the largest U.S. corporations, with reported earnings in 2005 of $1.59 billion and approximately 26,000 employees, providing reliable electricity to four million customers.

Southern Company owns four regulated retail electric utilities, Georgia Power, Alabama Power, Gulf Power, and Mississippi Power. In addition, Southern Company is a leader in environmental research. Since 1990, we have invested more than $1.5 billion on environmental controls and we are projecting to invest an additional $6 billion over the next decade in additional pollution control systems.

Southern Company is committed to deploying a variety of energy sources, including renewable energy. As part of this commitment, we are investigating the potential for offshore wind energy.

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[1] 70 *Fed. Reg.* 77,345 (Dec. 30, 2005).

As a potential developer of the resource, Southern Company brings an important perspective on the regulatory system needed to ensure robust offshore wind project development.[2]

II. SUMMARY OF MAIN POINTS

- National policy: A national policy has emerged on the importance of encouraging renewable energy sources. This is evidenced by clear congressional intent in the 2005 Energy Policy Act and by recent executive branch actions, presidential statements and executive orders.

- MMS actions must expedite offshore renewable energy projects: MMS offshore renewable energy regulations must be guided by this congressional and administration intent to expeditiously promote offshore renewable energy projects.

- Case-by-case authorizations: MMS should grant case-by-case authorizations for research and development of offshore wind energy before its final regulations are promulgated.

- Policy models: Offshore renewable energy development poses unique circumstances. Nevertheless, MMS can draw upon the Bureau of Land Management's Interim Wind Energy Development Policy as a potential model for encouraging offshore wind energy development, as well as certain aspects of federal mining laws, and FERC's hydroelectric power program.

- Data gathering: Data gathering research should be allowed to proceed with minimal regulatory hurdles, and data should be maintained as proprietary.

- Bidding: MMS should structure the bidding process to balance the competitive interest with the need to incentivize the industry.

- Payments: A payment scheme should recognize the policy intent to encourage renewable energy, and should be based on the use of federal property. MMS should not require a payment for research or for bidding. With respect to the development project, MMS should assess a payment based on the use of the seabed, rather than payment of royalties.

- Property interest: MMS should provide leases for placing pilings and towers on the OCS and an easement to allow for the laying of the transmission lines—in other words, for the construction and operation phases. The property interest transferred must be sufficient to attract development by providing stable, long-term rights and should be freely transferable to a qualified entity.

- Phased approval and environmental documentation: MMS should provide for phased approval of projects and should gear environmental documentation to the expected impacts of each phase. During the data gathering research phase of a project, categorical exclusions should apply. Given the nature of wind energy impacts and alternatives, it should be

[2] These comments discuss wind power, but apply equally to other forms of renewable energy in the Outer Continental Shelf, including but not limited to, energy derived from wave, current and tidal resources.

expected that an environmental assessment for the awarding of development rights will lead to a finding of no significant impact.

- Extent of MMS regulatory authority: MMS should assume no more than the minimum necessary regulatory authority over the ongoing operation of the project. Energy production is governed by other state and federal laws and regulated by state and federal agencies.

III. PURPOSE OF THE ENERGY POLICY ACT OF 2005 AND SECTION 388

A. Encouragement for Renewable Energy Development and the Energy Policy Act of 2005

ANPR Question: 24, 28

In EPACT, and in Section 388 in particular, Congress and the Administration clearly intended to promote renewable energy production. Such production, in its infancy on the Outer Continental Shelf ("OCS"), should be encouraged by reasonable and balanced regulation.

This intention was evident from the early development of the legislative framework for the Act. The May 2001 National Energy Policy report, which formed the basis for the President's Energy Policy Initiative, itself a major building block for EPACT, highlighted the Administration's commitment to encouraging the production of renewable energy.[3] The policy report stated that "a sound national energy policy should encourage a clean and diverse portfolio of domestic energy supplies."[4] More recently, President Bush announced his explicit support for wind energy in his 2006 State of the Union address, and through his proposed budget which increases funding for wind energy research.

The principal drafters of EPACT and other prominent Members of Congress from both sides of the aisle listed renewable energy development as a leading purpose of the Act. House Energy and Commerce Committee Chairman Joe Barton (R-TX) claimed: "This bill is going to transform our Nation's energy economy. It is going to breathe new life into clean coal technology, nuclear technology, *renewable technology*, and the ethanol industry."[5] House Energy and Commerce Committee Ranking Member John Dingell (D-MI) said the bill represents "major progress on . . . developing renewable energy sources . . . and significant progress for

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[3] Also in May 2001, President Bush issued Executive Order No. 13,212 to urge federal agencies to take actions to "expedite energy-related projects."

[4] National Energy Policy Development Group, *Reliable, Affordable, and Environmentally Sound Energy for America's Future*, p. 6-1. Chapter Six of the report is entitled "Nature's Power, Increasing America's Use of Renewable and Alternative Energy." *Id.* The report notes that "renewable and alternative energy supplies not only help diversify our [nation's] energy portfolio, they do so with few adverse environmental impacts." *Id.*

[5] *Cong. Rec.*, p. H6654, Statement of Rep. Barton, July 27, 2005 (emphasis added). He added: "This bill . . . is very balanced for both conservation and production . . . . There is a strong title on renewable energy . . . ." *Id.*

energy research and development programs, including research in very deep water, something about which there has been some unjustified criticism raised lately."[6]

Senate Energy and Natural Resources Committee Ranking Member Jeff Bingaman (D-NM) pushed for even more renewable energy encouragement in the bill, saying "resources that have not yet been as extensively developed as they might otherwise be, such as renewable energy, [must] get the policy assistance they need to make their maximum contribution."[7] His colleague, Senate Energy and Natural Resources Committee Chairman Pete Domenici (R-NM), agreed: "renewables are important. This bill recognizes renewables in many aspects and ways."[8]

The strongest evidence of policymakers' intent to encourage renewable energy production is in the Act itself. No fewer than six titles of EPACT include support for renewable energy and innovative technologies—particularly wind energy—including production incentives, loan guarantees, federal purchase requirements, clean energy bonds, tax incentives, and other provisions.[9]

B. The Purpose of Section 388

1. *Encouraging renewable energy development*

Section 388 is part of the overall effort in EPACT to encourage renewable and alternative energies. It authorizes the Secretary of the Interior to transfer a property interest in the OCS to a private developer to produce renewable and alternative energy. It is clear from Administration testimony and statements by its congressional sponsor that the purpose and intent of Section 388 is to encourage innovative alternative energy projects on the OCS and to make the process for project research, evaluation, development and production more efficient.

At a March 2003 hearing on predecessor legislation to Section 388, House Subcommittee on Energy and Mineral Resources Chairwoman Barbara Cubin (R-WY), the legislation's sponsor, said: "the bill clarifies the jurisdiction for these projects so that private sector entities, wanting to develop alternative energy resources offshore, will have a clear path by which to approach

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[6] *Cong. Rec.*, p. H6959, Statement of Rep. Dingell, July 28, 2005. Support was no less fervent on the Senate side. Senator Chuck Grassley (R-IA), Chairman of the Senate Finance Committee, declared that he was "very proud of a long history of supporting new alternative energy concepts in the production of electricity. The energy conference agreement continues that commitment." *Cong. Rec.*, p. S9341, Statement of Sen. Grassley, July 29, 2005. Grassley's Democratic counterpart on the Senate Finance Committee, Sen. Max Baucus (D-MT), added: "the bill recognizes the need for a diverse energy portfolio, it fosters energy production from wind or coal in Montana, to geothermal sources in California, and it will help create jobs by promoting domestic energy production." *Cong. Rec.*, p. S9359, Statement of Sen. Baucus, July 29, 2005.

[7] *Cong. Rec.*, p. S6442, June 14, 2005.

[8] *Cong. Rec.*, p. S6441, June 14, 2005.

[9] See, e.g., EPACT Sections 202, 203, 1301, 1303, and 1701-04.

relevant federal agencies for permits."[10] This provision clearly intends to facilitate private sector development of renewable energy on the OCS.

MMS Director Johnnie Burton testified at the 2003 hearing that the legislation originated with the Administration and that "the Administration strongly supports [its] enactment."[11] She explained:

> [T]he Administration believes there are several benefits associated with enacting the legislation. In general, we believe it has the potential to encourage innovative alternative energy projects on the Outer Continental Shelf. It supports the President's national energy policy initiative to streamline the permitting for energy production in an environmentally sensitive manner, and it will further the Secretary's commitment to facilitate renewable energy projects on Federally managed lands.[12]

By enabling the Interior Department to inform other agencies of a particular proposal, she noted the legislation's benefits of "better facilitating its timely review and consideration."[13]

2. *Cape Wind litigation*

Congress also enacted Section 388 to close a gap in authority highlighted by the First Circuit's recent decision in *Alliance to Protect Nantucket Sound, Inc. v. United States Department of the Army* ("*Cape Wind*").[14] The First Circuit held that the U.S. Army Corps of Engineers ("Corps") did not act arbitrarily by issuing a Section 10 permit for a Cape Wind's data gathering activities because the data gathering did not infringe on any federally protected property interest.[15] However, the court did not decide whether a property interest was needed for the operational stage of the project, nor did it decide what, if any, agency had authority to transfer the property interest.[16] Intending to fill this gap and clarify procedure, Congress gave MMS authority in

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[10] March 6, 2003 Hearing, p. 62.

[11] *Id.* at p. 22.

[12] *Id.* at p. 23.

[13] *Id.*

[14] 398 F.3d 105 (1st Cir. 2005). Cape Wind, a developer interested in gathering wind data to test the feasibility of building a wind energy facility on the OCS, sought a Section 10 permit from the U.S. Army Corps of Engineers ("Corps"). In obtaining a permit from the Corps, the applicant had to affirm that it had the "right" to proceed with the project as proposed, meaning it had a property interest in the area in question. The citizens group challenged the permit in part on the grounds that the developer could not affirm that it had a right to proceed because it did not have a property interest. 398 F.3d at 111.

[15] 398 F.3d at 114.

[16] *Id.*

Section 388 to transfer a property interest to a private developer seeking to produce renewable energy on the OCS.

C. Regulations Must be Guided by the Goals of EPACT Section 388

The regulations promulgated for offshore renewable energy development must be guided by the renewable energy encouragement goals of EPACT and the purposes underlying Section 388. Southern Company is investigating the viability of wind power in the OCS near the service territories of its subsidiaries. If those investigations demonstrate viability, Southern Company may develop wind energy in the offshore areas of the United States. It is critical that MMS's Section 388 regulations encourage rather than stunt these existing and ongoing efforts.

IV. STATUS OF OFFSHORE WIND ENERGY

A. Offshore Wind Development in North America is in its Infancy

ANPR Questions: 1, 28

The United States currently lacks an operational offshore wind power facility, though onshore wind power generating capacity is strong and growing, with more than 2,500 MW of wind generation installed in 2005 alone. Total U.S. installed onshore capacity currently amounts to nearly 10,000 MW.[17]

Offshore wind-generated power contains great promise as an energy source for the United States. Potential offshore wind resources lie in close proximity to major population centers on the Atlantic and Gulf coasts, areas that cannot easily be serviced by onshore wind because of density and land use demands.

While construction costs are higher, offshore wind projects may not face the same difficulties gaining citizen acceptance that some onshore wind projects have experienced.[18] Offshore wind also reduces potentially contentious land use decision-making, and especially at this early stage when few potential projects have been publicly announced, does not intrude upon other economically viable activities.

To date, we are aware of only three formally proposed offshore wind projects in the United States: 1) the 130-turbine 420 MW Cape Wind project in Nantucket Sound; 2) the Long Island Power Authority project with 40 turbines to generate 140 MW; and 3) the 50-turbine 150 MW project off Galveston, Texas.

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[17] American Wind Energy Association, "Wind Energy Basics," Jan. 24, 2006, available at http://www.awea.org/newsroom/Wind_Energy_Basics.pdf.

[18] We are aware that two offshore wind projects under development in the Northeast—Cape Wind and the Long Island Wind Park—appear to have attracted public support outweighing public opposition.

If built, these three projects would generate 710 MW. However, the U.S. Department of Energy's National Renewable Energy Laboratory estimates that the United States possesses more than 900,000 MW (900 gigawatts ("GW")) of offshore wind energy potential that could be harnessed.[19] MMS's regulations should facilitate the process of investigating and developing this potential.

1. *The international picture*

Internationally, offshore wind projects have been generating electricity for more than a decade. About 600 MW of offshore wind energy is installed globally, almost all of it in Northern Europe. This is a tiny fraction of the more than 40,000 MW of offshore capacity the European Union predicts will have been built by 2020.[20] Over 50 GW is currently in the European pipeline, led by Germany, the United Kingdom and the Netherlands.[21] In Europe, wind power, both onshore and offshore, has been encouraged and supported by high-level policy, public financing, and secure expectations for long-term operation. For example, lease rights are given in perpetuity.

Operating offshore wind farms can be found in Ireland, the United Kingdom, the Netherlands, Denmark and Sweden. Outside Europe, Canada, China and Russia are planning offshore wind projects. The substantial overseas development indicates that offshore wind can be technically and economically viable provided there is a regulatory structure encouraging development. MMS will play a critical role in determining whether the U.S. can achieve its offshore wind potential and shift more of its electricity production to renewables like its industrialized counterparts in the European Union and elsewhere.

B. Regulatory and Economic Uncertainties Affect Feasibility in the United States

ANPR Questions: 24, 28

Potential offshore wind developers such as Southern Company are watching the Cape Wind and Long Island Wind projects with interest. The cost and time needed to develop these projects are driven more by the ease or difficulty of obtaining regulatory approvals than by technological challenges, and are major factors in whether more offshore wind projects will be built. Economic uncertainties have hampered the growth and exploration of renewable energy sources because investors do not have a clear picture that a significant upfront capital investment will generate sufficient returns.

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[19] U.S. Department of Energy, Massachusetts Technology Collaborative and GE, *A Framework for Offshore Wind Energy Development in the United States*, Sept. 2005, at 2, 10 (citing W. Musial and S. Butterfield, *Future for Offshore Wind Energy in the United States*, Proceedings of EnergyOcean 2004 Conference, NREL/CP-500-35313 (2004)).

[20] U.S. Department of Energy, Massachusetts Technology Collaborative and GE, *A Framework for Offshore Wind Energy Development in the United States*, Sept. 2005, at 2, 11.

[21] See European Wind Energy Association, at http://www.ewea.org/fileadmin/ewea_documents/documents/press_releases/2004/Wind_Directions.pdf. EWEA is targeting 70 GW of offshore wind for the year 2020.

Electric utilities considering wind energy development must take into account a variety of considerations. Utilities must consider how the cost of generation, together with time, capital and human resources, compare with other potential facilities powered by other energy sources in which shareholders' resources might be invested. They must consider whether it is worth the risk to own such facilities or to contract for the output of facilities owned by others. If they decide to build and own a facility, they must consider whether regulators will approve recovery for the facilities' construction, operation and maintenance, and whether the facility will be included in rate base to provide power to the utility's retail customers or must compete as "merchant generation" (power for sale on the open market). They must consider their interest in maintaining a fuel-diverse generation supply. And of course, they consider the community goodwill and public relations value of developing environmentally-friendly energy resources.

The timing of the authorization process must be predictable and reasonably brief so that there can be schedule certainty; delays in processing are as damaging to project viability as onerous regulatory provisions. The economic and regulatory uncertainties remain significant enough that we have not yet be able to fully commit to undertaking an offshore wind project. These facts are especially true for "pioneer" offshore projects in the U.S.

We will discuss below major economic factors implicated by the MMS's rulemaking process that will affect whether entities will develop offshore wind resources or pass them by. Considerations such as the cost and ease of obtaining rights to collect wind data and conduct other research; whether proprietary interests in research data are protected; the stability of the property right to be issued; the payment required to the federal government for use of the OCS; the extent to which the National Environmental Policy Act ("NEPA") and other environmental laws are applied to the stages of development; and the cost and burden of subsequent regulation, all will determine whether the will of Congress and the Administration to encourage development of wind resources on the OCS is effectuated or frustrated.

V. AUTHORIZATION FOR OCS ACTIVITIES BEFORE ISSUANCE OF FINAL REGULATIONS

MMS should allow minimally intrusive data gathering activities such as erection and operation of meteorological towers for gathering wind data to proceed on a case-by-case basis before final regulations are adopted.

Enactment of Section 388 signaled Congress's promotion of wind energy development and filled the authority gap identified in the *Cape Wind* decision, thereby rescuing renewable energy development on the OCS from legal uncertainty. Congress provided 270 days for the Secretary of Interior to consult with other federal agencies and the states and issue final regulations to implement the section—i.e., by May 3, 2006.[22] From the plain text of the Act, and from the purposes expressed by Congress and the Administration, it is obvious that the provision was intended to clarify this uncertainty within a short time frame in order to promote expeditious development of offshore renewable resources.

[22] 43 U.S.C. § 1337(p)(8).

Emphasizing the policy intent for quickly resolving legal uncertainty for offshore alternative energy projects, Congress included subsection (d) to clarify that certain projects under development at the time of enactment need not resubmit documents or seek for a second time authorizations already obtained. Given agencies' ability (discussed below) to provide case-by-case authorizations for projects proposed before final regulations are issued, and given the very small number of offshore alternative energy projects in which developers expressed interest prior to enactment, it is not surprising that Congress did not make special provision for new projects likely to seek authorizations before the adoption of final regulations. Congress rarely makes such provision, and the record appears absent of any intent that new projects wait in limbo, especially if final regulations are delayed beyond the statutory deadline for issuance.

It is our understanding that MMS does not plan to finalize a rule until at least the end of 2007. Until promulgation of a final rule, offshore alternative energy development will be in a regulatory transition period, but the MMS has ample tools to minimize uncertainty and to permit offshore alternative energy research and development.

Under *SEC v. Chenery* (II), agencies have the "informed discretion" to proceed, consistent with their statutory mission, either by rule or on a case-by-case basis.[23] It is consistent with such authority and essential to achieving congressional and presidential intent for MMS to entertain and process authorizations for offshore data gathering and wind development projects during this transition period. EPACT in no way deprived MMS of this traditional authority. In fact, all indications are that Congress expected continued processing of existing authorizations and expeditious implementation for new authorizations.

During this transition period, companies may be interested in conducting data gathering to verify existing wind information and to collect potential site-specific wind data. Associated research on site selection criteria including geological evaluations may also be needed before a company considers developing an offshore wind energy project. We encourage MMS to authorize this data gathering and research on a case-by-case basis in advance of issuing final rules for the following reasons:

- Data gathering is essential to determine the economic feasibility of offshore wind in specific locations. A minimum of one and typically three years of data are needed to make this determination. If this essential first step is delayed for years while MMS is drafting its final regulations, the actual development projects will be significantly delayed and may simply never be pursued as capital is deployed to other energy sources. Thus, delay of basic data gathering will stall and potentially kill many promising renewable offshore energy projects.

[23] 332 U.S. 194, 203 (1947) ("the agency must retain power to deal with the problem on a case-to-case basis, if the administrative process is to be effective").

- A case-specific approval for data gathering activity issued prior to adoption of final regulations is consistent with clear Administration and congressional policy to encourage wind energy and offshore alternative energy development.

- Such approval is in no way inconsistent with any federally-expressed interest in Section 388 or elsewhere—whether it be environmental, competitive, pecuniary, or navigational—assuming compliance with applicable laws and requirements.

- Even were such an approval to implicate interests that might cause the agency concern about establishing problematic precedent, few alternative energy projects are likely to seek research access to the OCS prior to adoption of final regulations.

VI. A NEW PARADIGM FOR A NEW INDUSTRY: EXISTING PROGRAMS AS POTENTIAL REGULATORY TEMPLATES

ANPR Question: 1, 36

While many existing federal programs may provide useful guidance for implementing Section 388, the combination of policy purposes behind any new statutory provision are unique, and there are clear distinctions in the statutory authorizations themselves. MMS will need to develop a program unique to the circumstances and fledgling nature of the offshore renewable industry, one that will encourage potential developers.

Among the existing programs MMS may want to consider and draw upon are the Bureau of Land Management's ("BLM") program for onshore wind energy development, BLM's implementation of the mining laws, a framework similar to FERC's recently developed Integrated Licensing Process for hydroelectric power, and MMS's oil and gas program under the Outer Continental Shelf Lands Act ("OCSLA").

A. BLM's Wind Energy Development Program

One alternative methodology MMS may consider in designing its offshore wind power development is the Bureau of Land Management's 2005 comprehensive Wind Energy Development Program. Southern Company supports BLM's focus on streamlining its authorization process to encourage the rapid development of wind energy on federal lands and urges MMS to adopt a similar developer-oriented focus both for offshore wind energy and other offshore alternative energy production. BLM specifically adopted this hands-off approach in order to facilitate wind power development.[24]

BLM initially issued an interim policy in 2002 without a rulemaking, but based in part on Title V of the Federal Land Policy and Management Act ("FLPMA") and Title 43, Section 2800 of the

[24] U.S. Department of the Interior, Bureau of Land Management, Record of Decision: Implementation of a Wind Energy Development Program and Associated Land Use Plan Amendments, December 2005, at 4, available at http://windeis.anl.gov/documents/docs/WindPEISROD.pdf.

Code of Federal Regulations. This interim policy provided for expedited authorization and documentation for onshore wind projects. The policy, among other things, facilitates wind energy development by:

- identifying right-of-way applications for both testing and monitoring and for wind energy development projects as high priority, setting a thirty-day processing time frame;
- encouraging rapid development by limiting data gathering to a defined time period;
- designating that all right-of-way applications (for both data gathering and energy development) will be processed on a first-come basis (only if two or more applications are submitted will a competitive bidding process ensue);
- setting a low threshold rental fee annually per data gathering tower;
- designating that data collected is proprietary;
- allowing for both data gathering and production rights-of-way to be assigned;
- not limiting the duration of a right-of-way grant, though suggesting they will probably be appropriate for a typical 30-35 year lifespan of a wind energy facility;
- setting forth a clear formula for a phased-in, size-appropriate base annual minimum rent and an annual rent based on commercial production once the project is generating revenue;
- discouraging speculation by requiring applicants to submit technical and financial qualifications;
- specifying that NEPA documentation should be undertaken progressively, at each unique phase of the process;
- suggesting that NEPA analysis for data gathering activities will be relatively minor, normally involving a categorical exclusion; and
- suggesting that NEPA analysis for a wind energy development application will normally be covered by an Environmental Assessment.[25]

One justification BLM has asserted for implementing its new Wind Energy Development Program is that it "is expected to minimize some of the delays that currently occur for wind

[25] U.S. Department of the Interior, Bureau of Land Management, Instruction Memorandum No. 2003-020, Interim Wind Energy Development Policy, Oct. 16, 2002.

energy development projects, ensure consistency in the ROW application and authorization process, and reduce costs."[26] BLM's 2005 Record of Decision on this program also demonstrates that the agency accounted for the perspective of the developer: "The Wind Energy Development Program is likely to result in the greatest amount of wind energy development over the next 20 years, at the lowest potential cost to industry."[27]

MMS should study the BLM model during its rulemaking because it is expressly designed to foster wind energy development and may provide many appropriate parallels to the offshore environment.

B. The Mining Laws

Federal hardrock mining law also serves as a useful precedent, particularly with respect to obtaining a property interest and paying fees to the government.[28] While mining law has long been a target of environmental and other criticism, the public policy that motivated Congress to enact it shares important commonalities with the policy purposes behind Section 388. The criticisms against it can be avoided in a new program for offshore alternative energy development because, as recognized by many environmental groups, these projects do not normally result in significant environmental concerns.

A key policy of the mining laws was to encourage development of hardrock minerals in the vast, then little-used open spaces of the western United States. Congress felt such development would promote manufacturing and encourage economic activity, while the payments to establish claims would ensure that only persons who were serious would stake claims.

Under this law, persons stake a claim to an area, post public notice of the claim, maintain their right to the claim by regularly performing work on the property, and if successful, convert their claim to ownership by paying a nominal $2.50 per acre fee and filing a "patent" with the government. The government lists properties on which a claim may be located, and private entities initiate the claims.

A similar system for developing alternative energy resources on the OCS makes sense, especially given the similar public policy purpose of encouraging development of the resource. If the MMS maintains relatively low regulatory and cost barriers to alternative energy development on the OCS, development is more likely to occur. Southern Company would support a regulatory regime in which a potential alternative energy developer could stake a "claim" to a defined area for the purpose of conducting research. Such claim would give the holder an exclusive right to conduct research, at least for a reasonable period of time. If the developer decides not to proceed, the claim is relinquished without need for payment (or at least

[26] *Id.*, at 4.

[27] U.S. Department of the Interior, Bureau of Land Management, Record of Decision: Implementation of a Wind Energy Development Program and Associated Land Use Plan Amendments, December 2005, at 5.

[28] Mining Law of 1872, 30 U.S.C. §§ 22-42.

anything more than nominal payment) to the government. If the developer proceeds, the claim can be converted into a longer-term property interest, with relatively low payments based on the use of the land to avoid discouraging development.

The hardrock mining laws have been criticized because they allowed parties who were not serious about developing minerals to occupy property to the exclusion of others. Thus, the laws were accused of failing to serve their own purposes. In addition, many claimed that the laws' environmental protections were too weak, and that the laws gave away publicly-owned minerals to private commercial entities. None of those concerns would arise if a similar system were instituted for alternative energy development on the OCS. MMS can provide a term-limited property interest for a reasonable research period. Environmental concerns associated with offshore alternative energy research and development are minimal as discussed below. Finally, there is no federal property interest in wind.

Notwithstanding federal ownership of the lands—and with them the hardrock minerals—to which the mining laws apply, Congress did not impose a royalty scheme and has not seen fit to do so in intervening years. While Congress considered instituting royalty payments in the 1990s, Congress rejected them out of concern that royalties would discourage this economic activity and harm struggling industries dependent on hardrock mining. That Congress foreswore a royalty system for hardrock minerals, despite concerns about the environmental effects of their development, is an important fact MMS should consider when devising a payment system for a new environmentally-friendly activity Congress wants to encourage and a resource the government does not own.

C. FERC's Hydropower Program

Some components of the Federal Energy Regulatory Commission's ("FERC") hydropower program could serve as a potential regulatory template for offshore wind development. The FERC program, which is administered under the Federal Power Act, has resulted in successful development of renewable hydropower. The FERC licensing and operational programs contain elements that MMS should consider utilizing in the development of the OCS renewable energy program.

With respect to development of new capacity or relicensing of existing capacity, recent revisions to FERC's licensing regulations are the result of years of experience in the production and regulation of renewable electrical power generating facilities. The focus of the licensing process is to efficiently authorize operating power generating facilities in the context of complex and potentially conflicting regulatory requirements from various agencies, and appropriate consideration of public input.

For project authorization, the FERC licensing process provides for early NEPA scoping and NEPA processes which run concurrently with other agency input, authorizations, or approvals. In this manner, necessary authorizations or approvals and appropriate considerations for the project are identified early and simultaneously within the federal licensing process, ensuring coordination, consultation, and reduction of potential conflicting regulatory requirements. We believe this approach is appropriate for the construction and operational phases (see below). The data gathering phase, which is significantly reduced in complexity and issues, would not require

such a level of coordination or the NEPA analysis that could be present at the construction and operation phase.

FERC's regulation of hydropower operations is focused upon the maintenance of safe and reliable power generation capacity in accordance with conditions developed in the licensing process. MMS's program should similarly focus on maintenance of safe and reliable power generation and capacity to meet the spirit of Section 388. Licenses are issued for a term of 30 to 50 years, reflecting the intensive planning and capital resource commitments required for projects. A similar term is appropriate for wind projects based upon the planning and capital resource commitments necessary for a wind project.

D. MMS's OCS Oil and Gas Program

MMS's oil and gas program under the OCSLA may seem like an obvious reference point, but important distinctions between oil and gas development and alternative energy development suggest that the BLM Interim Policy and mining laws provide better analogies for the regulation of offshore renewable energy projects. Notwithstanding the fact that Section 388 is now part of the same Act that authorizes OCS oil and gas drilling, the statutory authorizations, the resources, the markets for the resources, the potential environmental consequences of development, and the federal ownership interests are far different.

First, the industries, markets and resources are different for oil and gas than for offshore alternative energy. Oil and natural gas have intrinsic value, and there is domestic demand for them that far exceeds supply. They can also be stored for later use, are readily transported, and they have a variety of different end-uses and therefore a diverse market. Oil and gas resources are finite and considered to be non-renewable energy sources. These resources, as commodities, can be "possessed."

Alternative energy resources, particularly wind, have no intrinsic value as an energy resource. Unless its energy potential is instantaneously converted to electricity, it does not have energy value. Wind cannot be stored for later use. Wind resources are infinite, renewable and cannot be possessed. As an "intermittent" resource produced only when the wind blows, wind energy can only complement and not replace electricity sources that are available on demand. Wind energy also cannot easily compete against larger baseload generation facilities which must meet a constant load demand.

Markets for oil and gas are deep and well-established. Markets for wind are still developing. Whereas the oil and gas industry can withstand a rigorous regulatory framework, such a framework could cripple the offshore renewable industry before it even takes shape.

Second, the potential environmental consequences of oil and gas development are different than wind or wave energy. The oil and gas industry, as well as the MMS, should be commended for the low percentage of spills, leaks, and other incidents having an environmental impact. Nevertheless, the potential for adverse consequences exists if even a moderately sized incident does occur in oil and gas development. By contrast, the potential environmental damage from offshore alternative energy development is minimal.

Third, the U.S. government has an ownership interest in finite mineral extraction. The OCSLA expressly extends the federal government's ownership interest in the OCS to "the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters . . . all of which natural resources appertain to the United States. . . ."[29] The federal ownership is expressly limited to the "subsoil and seabed," and does not extend to other things on or above the OCS, including marine life, abandoned vessels, superjacent waters, or by extension, wind.[30]

All of the foregoing suggests MMS should draw sharp distinctions between the new Section 388 program and the oil and gas program, especially with respect to the extent of regulation required, the applicability of environmental requirements such as the National Environmental Policy Act, and the structure of payments to the federal government.

VII. SPECIFIC PROGRAM ELEMENTS

The following section contains several areas of potential program design on which we have specific comments at this early stage.

A. Flexibility in Determining Geographic Areas of Interest

ANPR Question: 4

Because MMS has little or no data on the feasibility of wind or the extent of developer interest in particular geographic areas, MMS should not seek to specify in advance large geographic blocks for wind development. As compared with other industries, interest in domestic offshore wind energy production is, at this time, apparently relatively low, and thus there is little reason for area-wide analysis. MMS should instead rely on the private sector to bring forward viable projects. Relying on the initiative of the private sector and focusing on parcels proposed by developers for projects will encourage offshore wind energy production and help solidify the industry. Of course, under Section 388(b), MMS is obliged to undertake a Coordinated OCS Mapping Initiative. However, no deadline is stipulated, and until the initiative is finalized and verified, MMS should rely on the private sector to identify and evaluate any geographic areas that may be of interest for wind energy projects.

B. Phased Process for Approval of Projects

ANPR Questions: 2, 6

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[29] 43 U.S.C. § 1302.

[30] See *Guess v. Read*, 290 F.2d 622 (5th Cir. 1961) (*cert. denied*, 368 U.S. 953 (1962)); see also *Treasure Salvors, Inc. v. Abandoned Sailing Vessel Believed to be the Senora De Atocha*, 408 F.Supp. 907 (S.D. Fla. 1976) (*modified on other grounds and affirmed*, 569 F.2d 330 (5th Cir. 1978)).

The offshore alternative energy project development process can be divided into three phases: research, construction and operation. Utilizing a phased development process will allow MMS to maintain maximum flexibility in the permitting of offshore alternative energy.

For example, during the research phase involving the installation of meteorological towers and the use of other tools and activities to collect data, little environmental regulation seems necessary and a long-term property interest is unwarranted. At this phase, payments or revenues should be waived to incentivize developers. During the construction phase, involving construction of wind turbines and the subaqueous burial of transmission cable, a different level of environmental review may be called for, a long-term property interest is essential, and a reasonable payment would be expected. For the long-term operations phase, MMS should focus on non-economic regulation, while maintaining regulatory flexibility regarding oversight and payment processes.

C. Expeditious and Proprietary Data Gathering

ANPR Questions: 2, 5, 6, 10, 12, 13, 30, 33, 36

The research phase of offshore wind energy development involves site testing and data gathering. MMS should allow private data gathering to proceed expeditiously, on a case-by-case basis prior to adoption of final rules. Data obtained from site testing should remain proprietary.[31] If developers have to worry about others gaining access to their data, they are unlikely to invest time and resources into testing wind energy viability. The BLM set forth a regime for wind energy development on land that protects the proprietary nature of the data, which MMS should adopt for this program.[32] Two different approaches to data gathering are outlined below.

1. *No MMS authorization should be needed for data gathering*

The decision in *Cape Wind* indicates that MMS authorization apparently is not needed for minimally intrusive data gathering activities, such as placing a temporary meteorological tower on the OCS.[33]

The *Cape Wind* litigation dealt with the right to construct a meteorological tower to measure wind speeds as part of the first phase of offshore wind energy development.[34] The First Circuit

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[31] Note that the Fish and Wildlife Service has provided for site evaluation data obtained by companies to remain proprietary and confidential. See, e.g., Memorandum from FWS Director to Regional Directors, "Implementation of Service Voluntary Interim Guidelines to Avoid an Minimize Wildlife Impacts from Wind Turbines," Apr. 26, 2004, at 3.

[32] U.S. Department of the Interior, Bureau of Land Management, Instruction Memorandum No. 2003-020, Interim Wind Energy Development Policy, Oct. 16, 2002, available at www.blm.gov/nhp/efoia/wo/fy03/im2003-020.htm.

[33] *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dept. of the Army*, 398 F.3d 105, 114 (1st Cir. 2005)

[34] 398 F.3d 105.

held that placing a data tower on the OCS does not infringe upon any federal property interest, thus the Corps did not act arbitrarily when it issued a Section 10 permit to Cape Wind to build a meteorological tower in the Nantucket Sound: "It is inconceivable to us that permission to erect a single, temporary scientific device, like this . . . could be an infringement on any federal property ownership in the OCS."[35]

Based on this reasoning, a developer should not need a property interest from MMS to gather data on the OCS. A developer should be allowed to proceed after obtaining an Section 10 permit from the Corps.[36] The primary federal interest that is implicated by the construction of such a facility—namely, the protection of navigation from obstructions erected in the waters of the United States—is precisely the interest already protected by Section 10.[37]

Of course, if a developer wishes to maintain exclusive use of an area for development purposes, some sort of property interest must be established, and the concept of "staking a claim," as under the mining laws, is apt. Once a developer determines that a particular site is suitable for building a wind energy facility, the developer would then apply for a long-term property interest with the MMS.

2. *If MMS requires authorization for data gathering, such authorization should involve minimal hurdles.*

To the extent MMS decides not to follow the *Cape Wind* ruling, it should assure that its authorization process for data gathering is expeditious, non-intrusive and available during the transition period before MMS rules are final.

Extensive precedent and policy rationales exist for minimizing regulatory burdens in the research phase of a project. BLM has facilitated the development of wind energy on its lands by both quickly approving permits for data collection, and by providing that information gathered will remain proprietary.[38]

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[35] *Id.*

[36] Once a developer determines that a particular site is suitable for phase two, building the wind energy facility, the developer would then apply for a property interest with the MMS.

[37] Section 10 of the Rivers and Harbors Act of 1899 provides in relevant part: "[I]t shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War." 33 U.S.C. § 403.

[38] U.S. Department of the Interior, Bureau of Land Management, Instruction Memorandum No. 2003-020, Interim Wind Energy Development Policy, Oct. 16, 2002.

In December 2005, BLM issued a Record of Decision implementing its comprehensive Wind Energy Development Program on BLM lands.[39] In this document, BLM noted that the decision "establishes policies and best management practices ("BMPs") for the administration of wind energy development activities and established minimum requirements for mitigation measures."[40] BLM specifically chose a policy that would "facilitate wind energy development"[41] "at the lowest potential cost to industry."[42] BLM has provided that "right-of-way applications for wind energy site testing and monitoring or for wind energy development projects will be identified as a high priority Field Office workload and will be processed in a timely manner."[43] Most critically, the DOI Department Manual specified that right-of-way applications for site testing and monitoring will be acted upon within 30 days.[44]

Under DOI guidance, NEPA documentation "focuses on major Federal actions significantly affecting the quality of the human environment."[45] NEPA procedures are discussed in more detail below, but in a number of areas, including BLM wind energy projects, categorical exclusions are routinely provided for the data gathering stages of a project, affirming that data gathering activities do not, on an individual or cumulative basis, "significantly affect the quality of the human environment."

To our knowledge, no federal research has yet been undertaken on the potential of the OCS for renewable energy development.[46] This contrasts with the situation onshore where comprehensive state wind maps have been prepared for most states by U.S. Department of Energy offices.[47] Obtaining data on wind power several miles offshore is significantly more costly than obtaining the same data on land. By providing an expeditious process and by

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[39] U.S. Department of the Interior, Bureau of Land Management, Record of Decision: Implementation of a Wind Energy Development Program and Associated Land Use Plan Amendments, December 2005, available at http://windeis.anl.gov/documents/docs/WindPEISROD.pdf.

[40] *Id.* at 2.

[41] *Id.* at 4.

[42] *Id.* at 5.

[43] U.S. Department of the Interior, Bureau of Land Management, Instruction Memorandum No. 2003-020, Interim Wind Energy Development Policy, Oct. 16, 2002.

[44] *Id.*

[45] U.S. Department of the Interior, *Departmental Manual*, Environmental Quality Programs Series, 516 DM 2.2(F), June 21, 2005.

[46] As noted earlier, Subsection (b) of Section 388 provides for a "Coordinated OCS Mapping Initiative," the purpose of which is "to assist in decisionmaking relating to siting of activities" authorized by Section 388. It is not clear when such mapping data will be publicly available.

[47] U.S. Department of Energy, Energy Efficiency and Renewable Energy Office, "State Wind Resource Maps," at http://www.eere.energy.gov/windandhydro/windpoweringamerica/wind_maps.asp.

protecting the proprietary nature of the data gathered, MMS would go a long way toward facilitating and incentivizing private sector data gathering.

Given these factors, we believe that a reasonable approach akin to "staking a claim" would be to grant a temporary easement or right-of-way for research, which may involve meteorological tower placement and other actions used to gather data. A temporary, short-term easement (e.g., three years) would prevent developers from buying and holding unproductive options and creating an anti-competitive environment. Alternatively, MMS might consider requiring a developer to submit a next-phase project development application within a certain number of years or the easement or right-of-way would lapse.

Consistent with data gathering for other types of projects and the approach used by the BLM, MMS should confirm a categorical exclusion for data gathering activities under NEPA. At least equally critical, MMS must commit personnel dedicated to approving data gathering activities within thirty days and must be prepared to entertain and grant such authorizations during the transition period prior to finalization of the new regulations.

D. Bidding Process

ANPR Questions: 2, 4, 5, 6, 30, 33

Section 388 calls for bidding on a competitive basis unless the Secretary determines that no competitive basis exists. Outlined below are two options for structuring the bidding process that will balance the competitive interest with the need to incentivize the industry.

1. *Notice calling for qualified bidders*

One option for bidding on the use of OCS tracts for alternative energy development would involve MMS issuing a *Federal Register* notice asking qualified bidders to submit geographical areas of interest for data gathering. Bidders would submit a description of the geographic areas they are interested in testing and developing on a competitive basis, and a description of their technical and financial capability to develop the area or areas identified. If only one developer submits for a particular tract of the OCS then, consistent with Section 388, MMS should conclude that no competition exists for that property and should award that developer a property interest for testing and development, assuming the developer meets appropriate bidder qualification criteria.

If more than one developer submits a request to test and develop a particular tract, then MMS should conduct a competitive bid for that tract. If at the end of the testing period the developer does not commence with developing the project within a certain time period, MMS could reopen the bidding for development of that tract. Structuring the bidding process in this way would incentivize alternative energy development.

As alternative energy uses on the OCS grow, MMS could revise its regulations as needed. If the offshore alternative energy industry grows more competitive, a different form of bidding may be more appropriate.

2. *Right-of-way with option to develop*

A second option for structuring a bidding process for the use of tracts on the OCS would be patterned on the BLM procedure and would involve granting developers a right-of-way for wind energy site testing and monitoring facilities. The agency would also grant developers an option to submit a lease application and a plan of development within a specified time after commencement of data gathering activities. MMS and potential developers would need to determine how long might be necessary to test an area for wind energy development potential. As with the BLM process, the developer would need a separate approval to exercise the development option after the testing phase is complete.

MMS will need to adopt a policy on the competitive process. BLM's guidelines in this area may be helpful and provide that rights-of-way will generally be processed on a "first-come" basis, unless certain unique circumstances hold, like two or more applicants hold power purchase agreements.[48] BLM points out that the first-come policy is consistent with the President's National Energy Policy to encourage wind energy development. MMS could adopt a similar process by which certain tracts are opened for application for data gathering activities, but applicants must submit certain minimum financial and technical qualifications. BLM requires such qualifications in any case to perform the data gathering and any subsequent energy production facility.[49]

At the expiration of the testing easement, MMS would evaluate the situation and, like BLM, would determine whether there is a competitive basis for leasing. The lands within the right-of-way area would not be available for other wind energy applications but if the holder did not submit a lease application with a plan of development within the defined period of time, the holder would lose the exclusivity and other developers would be permitted to request a right-of-way for use of the land.

A "first come" basis incentivizes wind energy development, but it balances that with the rights of the federal government to ensure that wind development is actually occurring on federal lands by requiring the developer to exercise its option and commence development within a specified time. The process gives weight to the interests of legitimate developers and encourages and simplifies wind energy production.

E. Criteria for Approving the Project

ANPR Questions: 3, 6, 8, 11

MMS should base the project approval primarily on factors related to bringing the energy source online expeditiously. In doing so, MMS should consider the technical and financial

[48] For more information on BLM's Wind Energy Development Policy, see U.S. Department of the Interior, Bureau of Land Management, Instruction Memorandum No. 2003-020, Interim Wind Energy Development Policy, Oct. 16, 2002.

[49] See discussion in Section F below on qualifications.

qualifications of the applicant, the feasibility of the proposed project, and again, the desire of Congress to encourage alternative energy production. Any bidding should occur before detailed environmental documentation is produced so as not to burden prospective bidders with analytical requirements on a project for which they may not receive development rights. Once an award is issued, an appropriate environmental analysis should begin.

Bidder qualifications should include:

- a description of the proposed project, setting forth that it meets the statutory description in Section 388;
- an initial feasibility statement indicating potential economic feasibility of the proposed project and the technical feasibility of connecting with the grid;
- financial qualifications of the applicant, including a demonstrated ability to complete the project in a timely manner, and ability to operate and maintain the facility (this qualification is designed to prevent speculators);
- proof of ability to secure project financing;
- proof of a willing buyer for the power, possibly including a power purchase agreement; and
- expression of a strategy or framework to address environmental risk management.

F. Awarding a Property Interest

ANPR Question: 3

MMS should enter into a lease with the awardee for placing the pilings and towers on the OCS and an easement to allow for the laying of the transmission lines—in other words, for the construction and operation phases. The property interest transferred must provide stable, long-term rights sufficient to attract development.

MMS should set forth lease terms that do not impose significant operational constraints on the energy industry. Other laws govern operations of offshore energy development, including OSHA and spill prevention and control regulations, not to mention many environmental resource protection regulatory authorities. MMS should not duplicate or expand these existing laws.

The lease should also be of sufficient duration to make the project economically feasible, especially in light of the significant development risk for offshore alternative energy projects. At a minimum, a thirty-year lease should be granted, though MMS should be open to considering longer leases based on developer submissions. In addition, MMS's bases to terminate leases should be limited (e.g., failure to develop the tract). Finally, a cure period should be standard if lease termination is threatened to allow for the breaching party to cure the contract breach.

The lease should be freely assignable to allow transfer of ownership between a developer who does not intend to own and operate the facility long-term and an energy company that does, or from one energy company to another. MMS should also establish means by which a developer can terminate a lease if a detailed feasibility study subsequent to the signing of the lease indicates the project is no longer feasible. The developer should be required to pay only for the time of use and not the remainder of the lease term.

As noted above, lease rights in Europe for offshore projects are given in perpetuity, perhaps one reason why development has occurred there.

These measures will provide much needed certainty necessary for business planning and will incentivize development and lessen the significant risks undertaken by the developer.

VIII. AUTHORIZATION PROCESS: COORDINATION AND CONSULTATION

ANPR Questions: 30, 31, 32, 33, 34

A. Federal Coordination

MMS has interpreted its authority granted by Section 388 as also granting it "lead agency" authority for offshore renewable energy.[50] This authorization is not at all plain from the text of the section, nor are we aware of any congressional intent to make such a designation. In contract to Section 388, other provisions of EPACT do expressly give other agencies lead agency status.[51]

Nevertheless, if MMS is prepared to carry out congressional intent to facilitate offshore alternative energy development, it may be useful for MMS to assume lead agency status for NEPA purposes even if such a designation was not expressly granted. MMS should use this status to simplify and expedite the process of obtaining necessary authorizations. This will allow private parties to acquire the means necessary to develop renewable energy facilities on the OCS quickly. MMS should promulgate any necessary regulations with an eye toward simplification and expediting other federal authorizations for renewable energy projects.

One area MMS may be precluded from exercising lead agency authority is the construction of transmission facilities on the OCS. While Congress did not expressly designate or grant lead agency authority in Section 388, in Section 1221 it designated the Department of Energy as lead agency "for purposes of coordinating all applicable Federal authorizations and related

[50] Section 388 "[a]mends OSCLA to authorize DOI to act as "lead" agency for alternative energy and marine-related uses on the OCS." "Energy Policy Act of 2005: OCS Alternative Energy & Related Uses," Walter Cruickshank, Deputy Director, Minerals Management Service, American Wind Energy Association Fall Symposium, Sept. 30, 2005, p. 5.

[51] See, e.g., Section 313 (designating the Federal Energy Regulatory Commission as lead agency to coordinate NEPA compliance for development of certain natural gas facilities); Section 369 (designating the Department of the Interior as lead agency to coordinate all applicable federal authorizations and environmental reviews for proposals to develop oil shale or tar sands projects); and Section 1221 (designating the Department of Energy as lead agency to coordinate all federal authorizations for electric transmission facilities).

environmental reviews of" transmission facilities, including "any authorization required under Federal law in order to site a transmission facility," and "such permits, special use authorizations, certifications, opinions, or other approvals as may be required under Federal law in order to site a transmission facility."[52] This authorization includes a requirement that the Secretary "provide an expeditious pre-application mechanism for prospective applicants to confer with the agencies involved" as to the likelihood of approval and key issues of concern.[53] Critically, DOE is also required to set timetables for agency approvals. Regardless of how MMS and DOE resolve this jurisdictional border, MMS must bear in mind the congressional intent of simplification and expedition.

The most important area for federal coordination is in the development lease phase. With respect to environmental permitting, MMS should reach an agreement with the Corps that MMS's Environmental Assessment ("EA") on the lease and easement will address the issues of relevance to the Corps, NEPA and public interest review and, under normal circumstances, can serve as the Corps NEPA documentation, or vice versa. The Corps, of course, will perform an independent review, but this review should be expedited by virtue of MMS having covered the relevant environmental resources. To duplicate NEPA review would add cost and delay for no environmental benefit.

B. State Consultation

Upfront consultation with states should ascertain whether there are specific geographic areas where renewable energy projects are inconsistent with the Coastal Zone Management Act ("CZMA") plans. Information from states about the desirability and feasibility of renewable energy project development from an economic, environmental and energy security standpoint should also be obtained to gauge the level of support or opposition for renewables development in particular geographic areas.

At a project level, DOE and MMS should consult with states regarding the issuance of the lease or easement but should be able to rely on the state's determination regarding consistency of renewables development with the state's coastal zone management plan. DOE and MMS should also establish joint, expedited procedures with the states to authorize the laying of transmission cables and their onshore connection.

IX. REGULATORY AND ENVIRONMENTAL CONSIDERATIONS

Wind energy is pollution-free and well-designed wind power projects have negligible impacts on the environment overall. Government support for renewable energy sources is premised on the idea that renewable energy may partly displace fossil fuel-based power sources and also reduce

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[52] P.L. 109-58, Section 1221(h) (incorporated as Section 216 of the Federal Power Act (16 U.S.C. § 824 *et seq.*)). Section 1221 does not define the term "transmission facility," but presumably the term would include subaqueous lines which would transmit electrical energy from the offshore power generation source to the onshore electrical grid.

[53] *Id.*, at para. (4)(C).

U.S. dependence on foreign sources of energy, particularly given that North American fossil fuel supplies are finite. Since wind is an inexhaustible resource, power generated from wind does not face the same fuel price fluctuations and volatility that some fossil fuel sources experience. Avian concerns have been significantly mitigated by better turbine siting and design in the past five years. With its ability to diversify the nation's energy sources with generally insignificant environmental impacts, wind power, particularly offshore, is strongly supported by congressional, Administration, and public policy.

A. MMS should not assume regulatory authority over the ongoing energy production aspects of the project because this is governed by other state and federal laws and regulated by state and federal agencies

ANPR Questions: 1, 2, 31, 32, 33, 35

In its ANPR, MMS states that it interprets the authority in Section 388 to grant property interests on the OCS as also providing it the authority to regulate the activities that occur on the installed platforms. Southern Company assumes this means that energy production and transmission activities must be conducted in accordance with existing environmental, safety, and other requirements. Southern Company would appreciate clarification as to the MMS's intention to regulate standards of practice, maintenance, safety and non-economic activities or concerns.[54]

A number of existing federal laws already govern energy production in the United States. Section 388 specifically preserves the authority of other regulatory bodies in this area. MMS may be able to assist with coordinating and expediting the authorization of projects to enforce congressional intent, as described above, but its involvement in any additional regulation, if any, should be limited to that necessary to effectuate explicit statutory responsibilities expressed in Section 388 or to assume a "lead agency" coordinating role, rather than inferring new authorities or duplicating existing regulation.[55]

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[54] Note that the Federal Energy Regulatory Commission and the states already occupy the field with respect to the regulation of electric service and electric transmission. Section 201(a) of the Federal Power Act provides: "[T]he business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and . . . Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824. States regulate the retail sale of electric energy and intrastate electric transmission, and also issue permits for the construction of transmission and generation facilities.

[55] Operation of such projects is already regulated by other agencies, including state regulatory utility commissions, the Federal Energy Regulatory Commission, the Occupational Safety and Health Administration, the National Oceanic and Atmospheric Administration, the Army Corps of Engineers, the Federal Aviation Administration, the Environmental Protection Agency, the Fish and Wildlife Service, the Coast Guard, and other authorities.

To effectuate the purpose of paragraph (p)(4) of Section 388 of EPACT, which requires the MMS to ensure that activities for which property rights are provided under the section provide for safety, protection of the environment, a fair return to the United States, and coordination with other agencies, among other things, it seems logical that wherever possible, MMS should simply require that applicants comply with the regulations to be applied by other agencies. Again, a new layer of regulation is likely to discourage potential development.

B. Environmental and NEPA Documentation Should be Minimized and Geared to the Particular Project Phase

ANPR Questions: 1, 2, 5, 11, 12, 13, 14, 15, 16, 17, 21, 28, 36

In sum, Southern Company believes that: 1) if MMS plays any role during the data gathering research phase of a project, categorical exclusions should apply; 2) an EA should be undertaken after awarding development rights but prior to the signing of the development lease; 3) given the nature of alternative energy impacts, it should be expected that the EA will lead to a finding of no significant impact ("FONSI"); 4) if MMS is to play a lead agency role, it must first issue an interim policy governing alternative or wind energy development authorizations offshore, or otherwise grant case-specific authorizations; 5) once this is process is established, if generic issues exist across all offshore alternative energy projects, MMS could undertake a programmatic EIS ("PEIS") to study such generic issues; and 6) after the PEIS is completed, subsequent project authorizations could tier their EAs off of the PEIS, leading to shorter EAs, followed by FONSIs. These points will be expanded below.

Environmental documentation for offshore alternative energy projects should be geared to the particular stage of the project at issue. For example, if an applicant is seeking approval to monitor wind speeds and collect data or conduct research, the applicant should not be required to submit environmental documentation on the project itself. Instead, more detailed documentation should await the issuance of the lease when the project feasibility study and the site monitoring data are available and can provide a robust basis for the NEPA environmental evaluation. Precedent exists for this structure: BLM separates environmental review for different phases of wind energy projects, noting that few data gathering activities result in projects. The BLM approach is discussed in more detail below.

1. *Data gathering should not require an MMS authorization, but if authorization is needed, the data gathering should be covered by a categorical exclusion*

As explained above, a separate and distinct authorization for data gathering activities is not required under the law to determine the feasibility of a wind farm. We recognize that, due to the potential that data gathering towers may impede navigation in open waters, a Section 10 permit from the Army Corps of Engineers is needed. But because data gathering is temporary and isolated and would have minimal environmental impacts, both individually and cumulatively, separate and potentially redundant MMS authorization requiring NEPA documentation is seemingly inappropriate and overly burdensome.

If, however, MMS decides that some form of MMS authorization is needed for data gathering, the authorization should be granted expeditiously and with a minimum of environmental documentation. A major obstacle to offshore wind energy's development, in addition to cost, is the lack of available data needed to evaluate and justify the investment of capital in this technology. Data gathering should be encouraged and environmental documentation at this stage in particular should be minimized.

Consistent with existing Department of Interior policy, we strongly believe that data gathering should be covered by a categorical exclusion. Categorical exclusions are defined in the Council on Environmental Quality ("CEQ") NEPA implementing regulations as:

> a category of actions which do not individually or cumulatively have a *significant* effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. . . .[56]

The CEQ regulations specifically call for agencies to reduce the paperwork involved in the NEPA process by:

> (p) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment and which are therefore exempt from requirements to prepare an environmental impact statement (Sec. 1508.4).[57]

Extensive precedent exists for granting data collection activities categorical exclusions. The Department of the Interior has in fact included among its categorical exclusions "nondestructive data collection, inventory (including field, aerial, and satellite surveying and mapping), study, research, and monitoring activities."[58] BLM has adopted a similar policy. The data collection and research involved in determining the feasibility of a wind project site fits squarely within this categorical exclusion.

Furthermore, MMS's own NEPA Guidelines include a categorical exclusion for "inventory, data, and information collection, including the conduct of environmental monitoring and nondestructive research programs."[59] Data gathering for wind projects may also qualify for several additional existing MMS categorical exclusions, including:

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[56] 40 C.F.R. § 1508.4.

[57] *Id.*

[58] Appendix 1, Department Categorical Exclusions, U.S. Department of the Interior, *Departmental Manual*, Environmental Quality Programs Series, 516 DM 2.2(F), June 21, 2005.

[59] Categorical Exclusions, Minerals Management Service, U.S. Department of the Interior, *Departmental Manual*, Environmental Quality Programs Series, 516 DM 15.4(A)(1), May 27, 2004.

- "All resource evaluation activities including surveying, mapping, and geophysical surveying which do not use solid or liquid explosives"[60]

- "Establishment and installation of any research/monitoring devices."[61]

- "Preliminary activities conducted on a lease prior to approval of an exploration or development/production plan or a Development Operations Coordination Plan. These are activities such as geological, geophysical, and other surveys necessary to develop a comprehensive exploration plan, development/production plan, or Development Operations Coordination Plan."[62]

- "Rights-of-ways, easements, temporary use permits, and any revisions thereto that do not result in a new pipeline corridor to shore."[63]

Although MMS's own manual contains a plethora of categorical exclusions that seem to apply to offshore wind data gathering, we urge MMS to explicitly indicate that one or more of these categorical exclusions applies to these data gathering projects.

2. *No additional environmental documentation should be required until the developer applies or bids for a development lease; the lease phase of the project should generally be issued with an EA/FONSI*

Once data gathering is complete and award of development rights is made to a project sponsor, MMS may need to undertake NEPA compliance prior to entering into a development lease (or authorizing the commencement of development activities) because signing such a lease could be considered a "federal action" under NEPA. MMS and/or the lessee will have to evaluate the environmental impacts of the development authorized by the leasing arrangement. Given the nature of these projects, MMS should expect that an EA and a FONSI will be appropriate for several reasons.

First, impacts to the ocean bottom will be temporary and minimal and limited to sinking pilings and laying transmission cable lines under the seabed. Second, towers will not significantly interfere with navigation and aquatic and avian impacts can be avoided, minimized or mitigated. Third, in the unlikely event that a particular project results in a "significant" impact, project proponents may include best management practices and/or other environmentally acceptable strategic measures as part of the project design and operation, justifying a "mitigated FONSI." Fourth, the Corps imposes permit conditions on applicants when issuing Section 10 permits

[60] *Id.* at 516 DM 15.4(B)(1).

[61] *Id.* at 516 DM 15.4(B)(5).

[62] *Id.* at 516 DM 15.4(C)(13).

[63] *Id.* at 516 DM 15.4(C)(15).

which will mitigate any potential significant impacts to navigation, cultural resources and fish and wildlife resources thus justifying a "mitigated FONSI." Finally, the alternatives to sourcing energy from renewables such as wind are not likely to have fewer adverse effects on the environment, and NEPA requires the applicant to conduct an alternatives analysis.

MMS can rely on prior work to substantiate minimal impacts for individual projects. The comprehensive, 3,800 page Draft EIS already performed for the Cape Wind project has examined all the possible environmental impacts of an offshore wind project and has established that the impacts are insignificant. In addition, ten years of offshore wind operation in Europe has demonstrated no significant environmental impacts. For example, academic teams of scientific researchers organized by the European consortium COWRIE (Collaborative Offshore Wind Research into the Environment) have shown in in-depth research that impacts on benthic bird-feeding[64] and on marine organisms from electromagnetic fields from windfarm cables[65] are minimal. Thus, historic and systematically compiled data can be utilized in MMS's evaluation of individual projects and to support a FONSI.

3. *After adopting an interim policy governing authorizations, MMS might consider undertaking a programmatic EIS*

As we emphasize elsewhere, if it is to assume a lead agency role, MMS must establish an interim policy or other process by which to authorize case-specific authorizations of offshore wind energy development. This policy might be similar to the one BLM has adopted and which is described above.

Over time and after gaining experience with offshore wind developments, MMS might find that generic, recurring issues exist for offshore wind projects and that a compilation of this generic information would be useful to streamlining the authorization process for individual projects. If so, the agency might consider undertaking a PEIS to produce a baseline of generic data about the environmental impacts of wind energy projects located offshore. However, during the several-year pendency of such a PEIS, MMS should grant case-specific authorizations for projects to move them forward, normally based on an EA/FONSI. As noted below, this is exactly the process that BLM adopted while it was forming its comprehensive onshore wind energy development policy. A prolonged PEIS process should not put research and project development on hold.

If pursued, the PEIS would involve substantial stakeholder involvement and would serve as a compendium of all direct, indirect and cumulative environmental and related impacts from authorizing offshore wind energy projects. The existence of the PEIS would allow individual

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[64] COWRIE-BEN-03-2002, "Predicting the displacement of common scoter *Melanitta nigra* from benthic feeding areas due to offshore windfarms," University of Wales, Bangor, Final Report - Executive Summary, at http://www.offshorewindfarms.co.uk/Downloads/ScoterExecutiveSummary.pdf

[65] COWRIE: Offshore Windfarms Putting Energy into the UK, "Investigation into the effects of electromagnetic fields (EMF) generated by offshore windfarm cables under various conditions," at http://www.offshorewindfarms.co.uk/Research/ResearchAreas/ElectromagneticFields.aspx

projects to merely identify any additional environmental impacts that are unique to that project, thus "tiering off" portions of the PEIS for the project's individual environmental documentation, which would be analyzed in an EA. The EA would then most likely lead to a FONSI. Relying on the generic information developed in a PEIS, the EA process would be shorter for individual applicants, facilitating the development of offshore wind energy.

Tiering is a well-established and frequently used technique in the NEPA process, specifically designed to "reduc[e] paperwork and duplication" and should be viewed as "a means of accomplishing the NEPA requirements in an efficient manner as possible."[66] A 1983 CEQ memorandum describes the concept succinctly:

> The Council's intent in formalizing the tiering concept was to encourage agencies, "to eliminate repetitive discussions and to focus on the actual issues ripe for decisions at each level of environmental review."[67]

Thus, applied to the offshore wind situation, tiered EAs for specific wind energy development projects could be based on a programmatic EIS undertaken by MMS.

4. *The BLM Wind Energy Development Policy may provide a useful model for encouraging the development of offshore wind energy*

In order to achieve its overall policy of encouraging and expediting onshore wind projects, BLM was specifically interested in reducing the burden of the NEPA process. In its 2002 Interim Policy, most of which is still applicable, BLM stated that revising field land use plans "would provide an opportunity to potentially reduce the amount of additional environmental review and documentation required to process a specific application in the future."[68]

With respect to data gathering, BLM recognized that such activities qualify for a categorical exclusion. BLM has further provided that short-term rights-of-way, including for some site monitoring and testing activities, qualify for categorical exclusions.[69] Specifically, this categorical exclusion is for "issuance of short-term (3 years or less) rights-of-way or land use authorizations for such uses as storage sites, apiary sites, and construction sites where the proposal includes rehabilitation to restore the land to its natural or original condition."[70]

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[66] CEQ Guidance Regarding NEPA Regulations, Memorandum from A. Alan Hill to Heads of Federal Agencies, 48 *Fed. Reg.* 34,263 (1983).

[67] *Id.* (citing Preamble, 43 *Fed. Reg.* 55,984, Nov. 29, 1978).

[68] U.S. Department of the Interior, Bureau of Land Management, Instruction Memorandum No. 2003-020, Interim Wind Energy Development Policy, Oct. 16, 2002.

[69] *Id.*

[70] *Id.* (citing DOI Departmental Manual 516, Chapter 11, Sec. 11.5, E(19) (DOI 2004)).

With respect to the development of individual projects, BLM gave its Field Offices the authority for determining the level of NEPA analysis required for individual wind projects which, in most cases, result in an EA followed by a FONSI.

After more than three years of implementing its interim policy on wind energy development, BLM issued a final Record of Decision and PEIS. The PEIS identified and addressed the environmental impacts related to onshore wind energy. BLM has decided, as a result of its comprehensive PEIS process, that "for many projects, it may be determined that a tiered environmental assessment is appropriate."[71] The PEIS has laid out most, if not all, of the standard environmental concerns associated with onshore wind projects. As a result, BLM has said it will "tier off the decisions embedded in the PEIS and limit the scope of additional project-specific NEPA analyses."[72] Tiered and shortened EAs enhance the chances for a finding of no significant impact.

In order to address environmental concerns, the PEIS process also led to BLM adopting best management practices ("BMPs") for individual projects, and encouraged adaptive management strategies, thus allowing these mitigation measures and practices to justify a "mitigated FONSI." The BMPs provide model mitigation measures for each relevant project's Plan of Development and right-of-way authorization stipulations.

The adaptive management aspect of BLM's program calls for project operators to develop monitoring programs to regularly observe environmental conditions at the site. Protocols and metrics are also established by operators to ensure that deviations are appropriately managed.[73] The adaptive management program may provide added support for the issuance of EAs and FONSIs.

Any of these approaches which can lead to expedited environmental documentation and compliances should be considered and adopted by MMS. MMS has the authority to issue an interim policy on environmental documentation issues before its regulations are finalized. Southern Company urges MMS to follow BLM's example with regard to issuing a categorical exclusion for data gathering and their approach to individual development projects which has tended to result in EAs and FONSIs. The interim policy provides an approach to both data gathering and project phases that will ensure adequate but timely environmental documentation. After adopting an interim policy and gaining experience with project authorization, MMS may find that generic environmental issues recur. In this case, MMS may wish to consider the value in undertaking a PEIS effort. However, such an effort should not delay or affect MMS's willingness to provide authorizations in the interim. If a PEIS is undertaken, MMS might expect that the process could result in additional measures and that subsequent environmental

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[71] *Id.* at A-3.

[72] *Id.* at A-4.

[73] *Id.* at A-5.

documentation could tier off the PEIS. A PEIS effort through MMS could also design BMPs. Both of these results could shorten EAs and lead to FONSIs in most cases.

X. PAYMENTS AND REVENUES

ANPR Questions: 23, 24

MMS should structure any payment regime to avoid discouraging renewable energy development. MMS should not require a payment for data gathering research or for bidding. This reasoning is supported by the *Cape Wind* decision discussed above, which held that a data tower "does not infringe on any federal property interest."[74]

With respect to an award of the lease and easement for placement of towers and transmission lines, developers should pay rent for the use of the seabed, but not a percentage of the value of the captured wind, wave, or other energy produced. In fact, MMS took this position when testifying before Congress. During the July 2002 hearing on H.R. 5156, a previous version of Section 388, Director Burton was questioned about royalty payments. Ms. Burton responded by stating: "My comment on that is the bill doesn't give us any such authority. We do not contemplate any kind of royalty regime at this point."[75] When the Senate version of the EPACT was passed in June 2005, the Chairman of the Senate Committee on Energy and Natural Resources, Sen. Pete Domenici (R-NM), issued a committee report that highlighted that flexibility with payment design might be another way to stimulate desired renewable energy production: "Production on federal lands and in the OCS can be encouraged through regulatory streamlining and incentives such as royalty relief."[76] While Section 388 now expressly lists royalties among the types of payments MMS may establish, a royalty scheme or any payment that deters alternative energy development seems contrary to federal policy.

Given that the creation of offshore wind projects is at its infancy in the United States, encouragement, rather than payments or royalties, should be the focus of the renewable energy program. We therefore urge MMS to suspend royalties or other payments until the viability of offshore wind projects in the United States has been established. If, however, MMS does charge some type of royalty payment, payments should be sufficiently low to avoid counteracting the obvious intent of Congress in enacting the renewable energy production tax credit to encourage such production and make it more cost-competitive. Moreover, if the developer demonstrates that the operations are experiencing unanticipated costs or that the rate of return is less than comparable energy investments, then MMS should allow the developer to suspend its rental or royalty payments.

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[74] 398 F.3d at 114.

[75] July 25, 2002 Hearing, p. 17.

[76] EPACT Report 109-78, Report Together with Additional Views to Accompany S. 10, at p. 7.

XI. CONCLUSION

About one percent of the country's electricity is generated by onshore wind power. Onshore wind power development has been spurred by state renewable portfolio standards in addition to the federal production tax credit of 1.9 cents per kilowatt hour. Offshore wind power is estimated to cost at least twice as much as onshore and it will not enjoy any additional incentives beyond what onshore wind power development enjoys. Because offshore wind power arguably contains fewer environmental and societal impacts than onshore turbines, it should be incentivized to an even greater extent. However, by instituting significant regulatory hurdles, red tape and fees, the opposite will result.

With the enactment of EPACT and Section 388, Congress intended to encourage renewable energy production and the MMS should act according to this congressional intent. MMS should allow data gathering and project development to proceed while the rule development is underway. MMS should promulgate rules that take account of the infant nature of the offshore renewable energy industry in this country and develop an authorization structure which actively encourages development. MMS involvement can and should expedite development, consistent with, but not duplicative of, environmental, navigation, and other federal protections.